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No. 94-1809

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.
and MATSUSHITA HOLDING CORPORATION,
Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: August 3, 1995

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Pursuant to Rule 37.3 of the Rules of this Court, the Washington Legal Foundation and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. *Amici* have not contacted counsel for Respondent Walter Minton. Counsel for Respondents Lawrence Epstein, *et al.*, declined

to consent to the filing of the brief, thereby necessitating the filing of this motion.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation. To that end, WLF has appeared before this Court as well as other federal and state courts in cases affecting the scope of the federal securities laws (*see, e.g., Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)) as well as in cases raising tort reform issues. *See, e.g., BMW of North America, Inc. v. Gore*, No. 94-896, *cert. granted*, 115 S. Ct. 932 (1995); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* before this Court in a number of cases of interest to the business community.

Amici are concerned by the proliferation of class-action lawsuits being filed under the federal securities laws and the inhibiting effect that such suits can have on the development of new businesses. *Amici* believe that the decision of the Ninth Circuit in this case, if allowed to stand, will exacerbate that trend by encouraging the filing of multiple class-action suits arising from a single business transaction. Multiple suits would tax the resources of the

federal courts, would provide no benefit to aggrieved shareholders, and would be a severe economic drain to the business community. The only group that stands to benefit from the Ninth Circuit's decision is the plaintiffs' bar, a group that has fared well even in the absence of multiple class-action suits.

WLF and AEF seek to file the attached brief because of their interest in promoting the welfare of the business community and the public at large; they have no direct interest in the outcome of this lawsuit or of other suits raising similar issues. Because of their lack of direct economic interests, *amici* believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, *amici curiae* WLF and AEF respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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August 3, 1995

QUESTION PRESENTED

Whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement released federal claims.

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INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement of the Case contained in Petitioners' brief.

In brief, this case concerns Matsushita Electric Industrial Co., Ltd.'s ("Matsushita") 1990 acquisition of MCA, Inc. through a tender offer of $66 per share of common stock. Respondents assert that Matsushita violated federal securities law by paying a premium price for shares belonging to two senior MCA officials -- MCA founder Lew Wasserman and MCA chief operating officer Sidney Sheinberg.

At approximately the same time as the tender offer, Matsushita separately acquired the shares of Mr. Wasserman in exchange for preferred stock in an entity known as MEA Holdings.[1] Mr. Sheinberg tendered his 1.2 million shares of MCA common stock in accordance with the terms of Matsushita's public tender offer. However, shortly after Matsushita accepted his shares, *MCA* (not Matsushita) paid him $21 million as compensation for his agreement to continue working for MCA despite the change in corporate control, for relinquishing his right to collect salary without performing future services, and for loss of a promised stock option bonus. Petition Appendix ("Pet. App.") 51a.

Respondents contend that Matsushita violated federal securities law by acquiring the Wasserman and Sheinberg shares on terms more favorable to those two insiders than were available to other MCA shareholders. Respondents contend (and Petitioners deny) that the $21 million payment from MCA to Mr. Sheinberg was actually a disguised

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[1] Matsushita acquired the Wasserman shares in this manner so that Mr. Wasserman could avoid recognition of capital gains on his shares. The transaction was structured with the intent that the preferred stock received by Mr. Wasserman be no more valuable than the tender offer consideration.

premium on the purchase price of Mr. Sheinberg's MCA stock, designed to induce him to tender his shares.

The Matsushita tender offer for MCA spawned several class-actions lawsuits, purportedly on behalf of a class consisting of all MCA shareholders. Three such class actions (subsequently consolidated) were filed in the Delaware Court of Chancery in September 1990. Plaintiffs in the Delaware proceedings raised three claims under Delaware law: (1) MCA directors breached their fiduciary duty of care by failing to take steps to maximize shareholder value upon a change of corporate control; (2) they breached their duty of candor by failing to disclose the compensation packages offered to MCA officers under the terms of the merger agreement; and (3) they breached their fiduciary duty of loyalty by making preferential arrangements for themselves as part of the tender offer. Pet. App. 35a-36a.

The instant shareholder lawsuits were filed in the U.S. District Court for the Central District of California, beginning in December 1990. One was filed by Respondent Walter Minton in his individual capacity; the other was filed by Respondent Lawrence Epstein and six other individuals (the "Epstein Respondents"), purportedly on behalf of all MCA shareholders at the time of the tender offer. The suits (later consolidated) alleged that Matsushita's tender offer violated SEC Rule 14d-10, 17 C.F.R. § 240.14d-10, which requires equal consideration for all

stock purchases made "during a tender offer."[2]

The district court denied a motion for class certification in April 1991. It granted summary judgment for Matsushita and dismissed the federal complaints on April 15, 1992. Pet. App. 45a-61a.

While Respondents' appeals from that dismissal were pending, Matsushita entered into a settlement agreement in the Delaware class action. In return for release of all claims arising out of its acquisition of MCA, Matsushita agreed to a $2,000,000 payment to former MCA shareholders. The settlement provided all shareholders with the right to opt out of the settlement.

The Delaware Chancery Court certified a class for settlement purposes and (pursuant to Del. Ch. Ct. R. 23(e)) required that notice of the proposed settlement be sent to all former MCA shareholders. The notice made clear that shareholders were entitled to opt out of the settlement, and that the settlement would release all state and federal claims arising out of the MCA tender offer, including the Rule

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[2] Rule 14d-10 provides in relevant part:

(a) No bidder shall make a tender offer unless:
(1) The tender offer is open to all security holders of the class of securities subject to the tender offer, and

(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

17 C.F.R. § 240.14d-10(a). Matsushita contends that all payments made to Mr. Wasserman were made *after*, not "during," its tender offer for MCA shares. Matsushita Certiorari Petition at 21-24.

14d-10 claims pending in the California litigation. Pet. App. 77a-101a.

Only 19 of the more than 10,000 shareholders elected to opt out of the settlement. Those 19 included Respondent Minton but did *not* include any of the Epstein Respondents other than Respondent Rockford. No named Respondent appeared in the Delaware Chancery Court to object to the class settlement.

The Delaware Chancery Court then examined the settlement, determined that it was "fair and reasonable" in all respects, and entered a judgment releasing all claims (including Rule 14d-10 claims) of those who had not opted out of the class. Pet. App. 63a-75a. It specifically found that the former MCA shareholders had been adequately represented in the Delaware proceedings and that the settlement amount was a reasonable approximation of the value of the claims being released. *Id.* On appeal, the Delaware Supreme Court affirmed the Chancery Court opinion in September 1993. Pet. App. 76a.

Only after the Delaware proceedings were concluded did the Ninth Circuit issue its decision in this case. On February 27, 1995, the Ninth Circuit issued an opinion reversing the district court's grant of summary judgment for Matsushita, ordering that summary judgment be entered for Respondents with respect to the Wasserman stock purchase, and remanding the case to the district court for a determination of damages. The Ninth Circuit acknowledged that the Delaware courts had explicitly released the claims being asserted by Respondent but asserted that the release was not entitled to full faith and credit because the Delaware courts lacked jurisdiction to issue such a release. Pet. App. 24a-40a. The Ninth Circuit also rejected the

reasoning employed by the district court in granting summary judgment to Matsushita.[3]

The Court granted Matsushita's certiorari petition on June 19, 1995, to review the Ninth Circuit's ruling that the Delaware settlement decree was not entitled to full faith and credit.

SUMMARY OF ARGUMENT

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires the federal courts to give the same preclusive effect to the Delaware judgment as would the Delaware courts. The Delaware courts have made abundantly clear that they would bar further litigation of Respondents' Rule 14d-10 claims. Accordingly, § 1738 requires dismissal of those claims in the absence of any evidence that Congress intended a partial repeal of § 1738 in connection with federal securities law claims.

The preclusive effect of the Delaware judgment is not affected by its status as a class action. Delaware complied fully with the requirements of the Due Process Clause before purporting to bind absent plaintiffs to its judgment. Such compliance is all that is necessary to entitle a class action judgment to full faith and credit under § 1738.

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[3] The Ninth Circuit disagreed with the district court's holding that Congress had not intended to permit private enforcement of Rule 14d-10. Pet. App. 4a-11a. The Ninth Circuit also disagreed with the district court's holding that the Wasserman transaction did not violate Rule 14d-10 because it did not occur "during" the tender offer period (Pet. App. 11a-20a); the Ninth Circuit held that the term "tender offer" as used in Rule 14d-10 should not be "interpreted to denote a rigid period of time." Pet. App. 15a.

Adopting the Ninth Circuit's decision in this case is likely to have significant adverse effects on litigation in the federal courts. It is likely to increase transactional costs associated with securities law class actions, increase the likelihood that corporations will face multiple class actions arising from the same transaction, and decrease the willingness of defendants to settle class actions.

ARGUMENT

I. § 1738 REQUIRES THE FEDERAL COURTS TO GIVE FULL FAITH AND CREDIT TO THE JUDGMENT OF THE DELAWARE COURTS

Respondents do not deny that the Delaware courts explicitly released the Rule 14d-10 claims that they are pressing in this case, except with respect to those shareholders who opted out of the Delaware settlement. Nor do they deny that shareholders were given notice that the proposed settlement intended to release such claims, that shareholders were told that they could opt out of the Delaware settlement if they wanted to preserve their Rule 14d-10 claims, and that the Delaware courts approved the settlement only after scrutinizing it for fairness and reasonableness and determining that the class was adequately represented. Under those circumstances, federal law required the Ninth Circuit to give full faith and credit to the Delaware court judgment.

The Full Faith and Credit Act, 28 U.S.C. § 1738, "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). In determining whether an earlier state

judgment bars subsequent litigation in the courts of that state, a federal court should "rely in the first instance on [that] state['s] preclusion principles." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985). If under "state preclusion principles" the earlier state judgment would bar subsequent litigation, § 1738 requires the federal court to enforce those rules "unless a later statute contains an express or implied partial repeal." *Kremer,* 456 U.S. at 468. This approach to enforcement of § 1738 is to be followed even in, as here, "a lawsuit involving a claim within the exclusive jurisdiction of the federal courts." *Marrese*, 470 U.S. at 381.

There is no doubt that, under Delaware preclusion principles, the Delaware settlement bars subsequent litigation of Respondents' Rule 14d-10 claims. Indeed, the settlement agreement explicitly approved by the Delaware Chancery Court states as much, and the Delaware Supreme Court affirmed the Chancery Court's decision. Thus, under *Kremer/Marrese,* continued litigation of the Rule 14d-10 claims is barred by § 1738 in the absence of a later statute containing an express of implied partial repeal.

There is no such partial repeal in this case. Respondents have pointed to no language in the Williams Act, 82 Stat. 454, that could even arguably qualify as an express repeal. With respect to implied repeals, the Court made clear in *Kremer* that it would not lightly find implied partial repeals of § 1738 because "'It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.'" *Kremer*, 456 U.S. at 468 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). *Kremer* spelled out the limited conditions under which the Court was willing to find implied partial repeals of § 1738:

> There are, however, "two well-settled categories of repeals by implication -- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest."

Kremer, 456 U.S. at 468 (quoting *Radzanower*, 426 U.S. at 154).

The relationship of § 1738 to the Williams Act (the source of the Securities and Exchange Commission's authority to issue Rule 14d-10) does not fall within either of these categories. There is no conflict -- irreconcilable or otherwise -- between § 1738 and the Williams Act. Nor can it be said that the Williams Act "covers the whole subject" of § 1738, since the Williams Act is silent regarding the preclusive effect to be given state court judgments in subsequent federal court actions.

It is, of course, true that federal law grants "exclusive jurisdiction" to the federal courts to hear claims alleging violations of the Williams Act "or the rules and regulations thereunder." 15 U.S.C. § 78aa. But the existence of exclusive federal jurisdiction has never been thought to create a conflict between § 1738 and the statute granting such jurisdiction. Indeed, in *Kremer*, the Court found no conflict between § 1738 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, while at the same time leaving unanswered the issue of whether exclusive jurisdiction over Title VII claims lies in the federal courts. *Kremer*, 456 U.S. at 479 n.20. *See also, Marrese,*

470 U.S. at 380 ("Our decisions indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts."). A federal statute granting the federal courts exclusive jurisdiction over certain types of claims may indicate the forum in which such claims are to be tried if they are to be tried at all, but is says nothing about Congress's intent with respect to whether prior state court judgments can have preclusive effect on such claims.

In refusing to give full faith and credit to the Delaware judgment, the Ninth Circuit ignored these well-settled principles regarding § 1738. Instead, citing *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accidental Health Ins. Gty. Ass'n*, 455 U.S. 691 (1982); and *Durfee v. Duke*, 375 U.S. 106 (1963), the Ninth Circuit held that the "general rule" established by *Kremer* does not apply if "the state court 'did not have jurisdiction over the subject matter or the relevant parties.'" Pet. App. 28a (quoting *Underwriters,* 455 U.S. at 704-05).

The Ninth Circuit has simply misread *Underwriters* and *Durfee*. Far from countenancing wholesale collateral attacks on judgments based on alleged lack of jurisdiction, the Court stated categorically in *Underwriters*:

> This Court has long recognized that "[the] principles of res judicata apply to questions of jurisdiction as well as to other issues." *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932). *See also Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939); *Davis v. Davis*, 305 U.S. 32 (1938). Any doubt about this proposition was definitively laid to rest in *Durfee v. Duke, supra,* at 11, where this Court held that "a judgment is entitled to full faith and credit -- even as to

> questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." The North Carolina courts, therefore, should have determined in the first instance whether the Rehabilitation Court [the Indiana court whose judgment was being collaterally attacked] fully and fairly considered the question of subject matter jurisdiction over the North Carolina deposit, with respect to pre-rehabilitation claims of the parties before it. If the matter was fully considered and finally determined in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts.

Underwriters, 455 U.S. at 706-07.

Respondents do not dispute that the Delaware Chancery Court notified shareholders that the proposed settlement would release all Rule 14(d)-10 claims, invited shareholders (including Respondents) to contest the proposed settlement, and satisfied itself that it did have jurisdiction before entering its judgment. Accordingly, the Ninth Circuit is bound by the Delaware court's determination regarding jurisdiction.

The Ninth Circuit, while conceding that the Delaware court "determined that it was jurisdictionally competent to enter a judgment settling the class action" (Pet. App. 28a n.25), based its refusal to grant full faith and credit to the Delaware judgment on vague references in *Durfee* (not repeated in *Underwriters*) to the possibility that there may be exceptions to the rule against collateral attack on a state court's jurisdictional determinations. The appeals court said, "In this case the policy of finality of judgments is

plainly outweighed by the federal interest in reviewing a state court's exercise of judicial power over claims which Congress has vested exclusively in federal courts." *Id.* That assertion not only effectively eviscerates the rule against collateral attack but also ignores *Marrese*'s plain statement that "a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." *Marrese*, 470 U.S. at 380.[4]

In sum, the Ninth Circuit's refusal to give full faith and credit to the Delaware judgment was a clear violation of § 1738.

II. THE DELAWARE JUDGMENT IS NO LESS ENTITLED TO FULL FAITH AND CREDIT SIMPLY BECAUSE IT AROSE IN CONNECTION WITH A CLASS ACTION

The Delaware Chancery Court's judgment purported to bind a class of all former MCA shareholders. But nothing in *Marrese* or *Kremer* suggests that a state court judgment entered in a class action is any less entitled to full faith and

[4] The Second Circuit case cited by the Ninth Circuit in support of its assertion actually undercuts the assertion. Applying *Kremer*, the Second Circuit held in *Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985), that the federal securities laws do not expressly or impliedly repeal § 1738. *Murphy* stated that the federal court's exclusive jurisdiction over federal security law claims evinced a congressional interest in uniform interpretation of those laws *(id.)*, but a holding that a federal securities law claim is barred by a prior state court settlement cannot possibly lead to non-uniform interpretation of securities law.

credit under § 1738 than is a judgment entered in a non-class action.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), sets forth the constitutional limitations on a state court's power, in the course of class-action litigation, to adjudicate the claim of a plaintiff who has not appeared in the action. The Court held that the Due Process Clause demands that, if the forum state wishes to bind absent plaintiffs concerning "a claim for money damages or similar relief at law," the absent plaintiffs must be afforded the following protections:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane [v. Central Hanover Bank & Trust Co.]*, 339 U.S. [306,] 314-315 [1950]. . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Phillips Petroleum, 472 U.S. at 812-13.

The Delaware court provided MCA shareholders with all the procedural protections demanded by *Phillips*

Petroleum. The court provided all shareholders (including Respondents) with notice of the proceedings (including a description of the action and the shareholders' rights in it) and an opportunity to be heard; it provided objecting shareholders with an opportunity to opt out of the proceedings; and (before it approved the settlement) it satisfied itself that the named plaintiffs adequately represented the interests of absent shareholders. Given the Delaware court's compliance with all the due process requirements imposed by *Phillips Petroleum*, there is simply no reason not to apply § 1738 in this case

In their brief opposing review by this Court, the Epstein Respondents repeatedly asserted the inadequacy of class representation in the Delaware proceedings. *See, e.g.*, Epstein Respondents' Opposition Brief at 21. They asserted the right to raise the adequacy of representation issue on collateral review:

> As noted, respondents did not appear in Delaware. Since *Hansberry v. Lee*, 311 U.S. 32 (1940), it has been clear that collateral attack on inadequate representation is proper in these circumstances.

Id. at 21 n.21.

The Epstein Respondents are simply wrong regarding their claimed right to raise the adequacy of representation issue in the federal courts. *Underwriters* makes clear that if they wanted to allege inadequate representation, they should have done so in the Delaware Chancery Court in connection with that court's "full and fair" consideration of the issue. *Hansberry v. Lee* is not to the contrary. *Hansberry* stands for the limited proposition that a litigant may collaterally attack a prior class action judgment where she

did not receive adequate notice that the judgment was intended to be binding on her. *Hansberry*, 311 U.S. at 40. Federal courts have consistently read *Hansberry* in this limited fashion and have declined to interpret it as permitting wholesale collateral attacks on adequacy of representation determinations. *See, e.g., Smith v. Allegheny Corp.*, 394 F.2d 381, 391 (2d Cir. 1968); *O'Burn v. Shapp*, 70 F.R.D. 549, 552 (E.D.Pa. 1976).

The Ninth Circuit was unwilling to concede that a state court judgment could *ever* operate to bar subsequent federal court adjudication of an exclusively federal claim. The Ninth Circuit nonetheless attempted to distinguish contrary decisions from the First and Third Circuits (*Nottingham Partner v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994)) by asserting that in those cases "the state and federal claims arose out of the identical factual predicate." Pet. App. 33a. Those two cases are not distinguishable on that basis, because the factual overlap between state and federal claims is at least as great here as it was in those cases.[5] More important, however, is the irrelevancy of factual overlap in deter-

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[5] In this case, the Delaware plaintiffs asserted a claim that the defendants breached their fiduciary duty of loyalty by making preferential arrangements for themselves as part of the tender offer -- a claim based on facts virtually identical to the facts underlying Respondents' Rule 14d-10 claim. The Ninth Circuit attempted to downplay the significance of that factual overlap by asserting that the Delaware claim had no basis in Delaware law. Pet. App. 36a. We find it remarkable that the Ninth Circuit bases its refusal to extend full faith and credit to the Delaware judgment on its own interpretation of Delaware law. Moreover, the strength or weakness of various claims raised in the Delaware and federal actions has no bearing on whether an overlap of factual claims actually exists.

mining whether § 1738 is applicable. One cannot seriously dispute the reasonableness of attempting to settle all possible shareholder claims arising from the MCA tender offer when settling a shareholder class action arising in connection with that tender offer. So long as there was any reasonable basis for the Delaware court to conclude that it had jurisdiction to approve a settlement covering the Rule 14d-10 claims -- and *Marrese, Kremer,* and *Phillips Petroleum* suggest that such a conclusion was eminently reasonable -- § 1738 required the Ninth Circuit to give full faith and credit to the Delaware judgment.

Indeed, the Ninth Circuit is the *only* federal appeals court that has indicated an unwillingness to apply § 1738 to the facts of this case. Contrary to the Ninth Circuit's contention, its decision is not supported by the Second Circuit's decision in *National Super Spuds v. N.Y. Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). *National Super Spuds* stands for the limited proposition that a class action may not settle claims which the class representatives do not themselves possess. *Id.* at 16. But that is not a concern in this case; the Delaware class representatives possessed precisely the same claims -- including the Rule 14d-10 claim -- as did Respondents.

In sum, the fact that the Delaware judgment involved class claims in no way lessens its entitlement to full faith and credit in the federal courts. Rather than seeking to challenge the Delaware judgment collaterally, the non-opting-out Respondents were required to pursue any challenge to the Delaware Chancery Court judgment "by way of appeal through the state-court system and certiorari from [the U.S. Supreme] Court." *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 525 (1986).

III. THE NINTH CIRCUIT'S DECISION THREATENS TO DISRUPT CLASS ACTION SETTLEMENTS AND TO ENCOURAGE MULTIPLE CLASS ACTION SUITS ARISING FROM A SINGLE SECURITIES LAW TRANSACTION

The number of securities law class actions in the federal courts has increased significantly in recent years. As many securities law class actions were filed between 1990 and 1993 as were filed during the entire decade of the 1980s. Testimony of Marc E. Lackritz to the Senate Banking, Housing and Urban Affairs Committee's Subcommittee on Securities (March 2, 1995). The aggregate damages sought in all such class actions pending at the end of 1993 was nearly $29 billion. *Id.*

There is considerable on-going debate regarding whether securities law class actions are an efficient means of policing the securities markets and whether the transactional costs of such massive litigation exceeds any value produced.[6] Regardless where one comes out on that debate, the magnitude of such litigation ought to give one pause before adopting a rule of law likely to increase such litigation significantly.

That is precisely the result to be expected if the Court affirms the Ninth Circuit's decision. The Ninth Circuit's decision makes it virtually impossible for a corporation to

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[6] In April 6, 1995 testimony before the Subcommittee on Securities, both former SEC Chairman Richard C. Breeden and former SEC Acting Chairman Charles C. Cox spoke in favor of pending legislation to curb perceived excesses in securities law class actions. Such legislation received initial approval from both the House and the Senate in the spring of 1995.

negotiate a class action settlement that will settle all claims arising from a single transaction. Rather, any state court settlement will be subject to attack in the federal courts on the ground that it cannot definitively settle all exclusively federal claims. Since virtually all securities law claims (including those brought under SEC Rule 10b-5) fall within the exclusive jurisdiction of the federal courts, the potential for multiple lawsuits is apparent. Thus, a business seeking to settle all claims would likely need to enter into a federal court settlement covering all exclusively federal claims as well as one or more state-court settlements covering state-law claims. A single federal court settlement may well not be sufficient considering that: (1) a federal court is under no obligation to exercise pendent jurisdiction over state-law claims when an independent basis for jurisdiction over such claims is lacking; (2) states can and do assert that certain state-law claims can only be raised in state courts; and (3) a defendant seeking to settle cannot choose its own forum -- if it has only been sued in state court, its ability to remove the case to federal court before effecting a settlement is quite limited.

A rule that effectively requires defendants to enter into multiple settlements will increase the transaction costs of securities law class actions considerably. Recent studies have suggested that for every dollar awarded to shareholders in securities law class actions, another dollar goes toward litigation costs. J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 573 (1991). If multiple settlements are to be required in order to settle all claims arising from a single transaction, litigation costs will inevitably consume a larger share of funds.

Alternatively, the Ninth Circuit's decision could decrease the willingness of defendants to settle class claims; such settlements obviously are of less value to a defendant if they cannot provide the defendant with assurance that he can avoid future litigation by entering into a settlement.

Conversely, individual litigants have little cause for complaint if defendants are permitted to settle all class claims in a single lawsuit. Under such a system, all class members are assured that their claims will not be settled except on terms found fair and reasonable by an independent court. If they are unhappy with the class settlement, they are free to opt out and pursue their claims independently. Their net recoveries are likely to be greater when legal fees are minimized due to elimination of multiple lawsuits.

The only group that stands to gain from the Ninth Circuit's decision are the lawyers. Indeed, it is clearly the lawyers who are driving this litigation. If Respondents really had had any strong *personal* objections to the Delaware settlement, one would expect them to have expressed those objections to the Delaware court rather proceeding with a collateral attack on the settlement in the federal courts. Respondents were provided with all the options required by *Phillips Petroleum* when they were given a choice between accepting the Delaware settlement or opting out of the class and proceeding on their own. Nothing in *Phillips Petroleum* suggests that class members are entitled to a third option -- that of opting out of one class so that they can organize their own separate class.

In sum, the Ninth Circuit's decision has nothing to recommend it in terms of public policy. It is likely to lead to the filing of multiple class action suits arising from the

same transaction, and to a decreased willingness of defendants to settle such claims.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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